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THE HONORABLE FRED VAN SICKLE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON
AT RICHLAND

JAMES S. GORDON, JR,

Plaintiff,

v.

IMPULSE MARKETING GROUP, INC.,

Defendant

IMPULSE MARKETING GROUP, INC.,

Third Party Plaintiff

v.

BONNIE GORDON, JAMES S. GORDON, III, JONATHAN GORDON, JAMILA GORDON, ROBERT PRITCHETT, EMILY ABBEY, and LEW REED

Third Party Defendants

NO. CV-04-5125-FVS

LR 56.1(C) REPLY TO DEFENDANT'S COUNTER_STATEMENT OF FACTS RELATED TO PLAINTIFF'S MOTION TO DISMISS OR FOR SUMMARY JUDGMENT

Jury Trial Demanded

COMES NOW the Plaintiff, James S. Gordon, Jr., and files this reply to the

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Defendant's counter-statement of facts pursuant to LR 56.1(c).

PRELIMINARY OBSERVATIONS

The Defendant has included with its response what purports to be a "motion" to strike. The Plaintiff has responded to this in a separate paper, filed concurrently herewith. Not included in its' listing of facts, but included within its' narrative, the Defendant has alleged that the Plaintiff has "refused to provided (sic) Defendant with any emails he allegedly received that he claims violate Washington law." The Plaintiff has never refused to provide the emails, as the Defendant has never asked to inspect them.

The Plaintiff's Rule 26 Disclosures

Within the Defendant's narrative, the Defendant has also alleged that a series of "questions" need to be resolved prior to deciding the motion for summary judgment. The Defendant then repeats these same "questions" in the Defendant's response to Plaintiff's facts 4, 6, 8, 9-12, 14, 16-18 and 24, where the Defendant repeatedly asserts that the Plaintiff's Rule 26 disclosures in a prior lawsuit raise these same "questions," and thereby create an issue of material fact.

At the outset, all the Plaintiff's rule 26 disclosure says is that the Third Party Defendants "may" have discoverable information about emails sent to them by the Defendant at a Gordonworks.com address. This statement does not even begin to

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establish that either the Third Party Defendants or the Plaintiff did anything except receive email. The mere act of receiving an email does not provide the basis for any of the Defendant's counterclaims or Third Party Claims, nor does it begin to establish any of the remaining facts necessary to support the Defendant's counterclaims and Third Party Claims.

Rather than repeat a series of identical responses to each of these "questions" for each of Plaintiff's facts individually, the Plaintiff believes that a single explanation applying to all of the Defendant's repeated assertions concerning Plaintiff's facts 4, 6, 8, 9-12, 14, 16-18 and 24 would provide a more economical showing of how none of these "questions" raise any issue of material fact. In order, the Defendant's "questions," and the Plaintiff's responses, are as follows:

a) The Defendant repeatedly asserts that the Plaintiff's Rule 26 disclosures in a prior lawsuit raise a question of material fact about "Whether or not Gordon, Third Party Defendants, or anyone else allegedly received the commercial emails at issue."

This allegation is irrelevant to the Defendant's counterclaims and Third Party claims because the Defendant's counterclaims and Third Party claims are not

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predicated on an allegation that Gordon, Third Party Defendants, or anyone else did or didn't receive the commercial emails at issue. Nevertheless, contrary to the Defendant's allegation, Gordon has testified to the fact that he did, in fact, receive the emails. Plaintiff's Fact #12, Gordon Declaration, ¶ 12. The Defendant has not entered any evidence to contest this fact, and therefore has admitted this fact.

b) The Defendant repeatedly asserts that the Plaintiff's Rule 26 disclosures in a prior lawsuit raise a question of material fact about "Whether or not the Defendant transmitted the alleged emails at issue."

This allegation is irrelevant to the Defendant's counterclaims and Third Party claims because the Defendant's counterclaims and Third Party claims are not predicated on an allegation that the Defendant did or didn't send the emails at issue. While this allegation is not material to any of the Defendant's counterclaims or Third Party Claims, the Plaintiff notes that the Defendant has entered evidence that flatly contradicts its own allegation. Specifically, Exhibit E of the declaration of Phil Huston is a "Website Development and Marketing Services Agreement" between the Defendant and CMG that provides that the Defendant undertook responsibility to "provide various marketing services designed to drive traffic to

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CMG's USA Gold Card Website." See paragraph 2. This agreement shows that it was the Defendant, and not CMG, who sent the emails.

c) The Defendant repeatedly asserts that the Plaintiff's Rule 26 disclosures in a prior lawsuit raise a question of material fact about "Whether or not the emails at issue violated Washington law."

This allegation is irrelevant to the Defendant's counterclaims and Third Party claims because the Defendant's counterclaims and Third Party claims are not predicated on an allegation that the emails at issue did or didn't violate Washington law.

d) The Defendant repeatedly asserts that the Plaintiff's Rule 26 disclosures in a prior lawsuit raise a question of material fact about "Whether Gordon and/or Third Party Defendants provided Impulse, and/or its marketing partners, with untruthful or inaccurate registration information."

This allegation is directly relevant and indeed forms the first half of the core of the Defendant's counterclaims and Third Party claims. However, the Plaintiff's

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Rule 26 disclosures do not remotely indicate that either Gordon and/or Third Party Defendants provided Impulse, and/or its marketing partners, with "untruthful or inaccurate registration information." All they indicate is that people "may" have received emails. Further, nowhere else in the record has the Defendant entered any evidence whatsoever showing any "untruthful or inaccurate registration information" was provided by Gordon, the Third Party Defendants, or anyone else. Instead, the Defendant has asked the court to strike the Motion for Summary Judgment to allow the Defendant to conduct discovery to find evidence to support this allegation. However, if the Defendant's allegations were true, *evidence supporting this allegation would already be in the Defendant's possession*. How can the Defendant possibly maintain that it was provided with "untruthful or inaccurate registration information" if it cannot produce this information? The fact that the Defendant has not produced any such evidence demonstrates that it does not exist, and the Defendant's mere allegations to the contrary do not raise a question of material fact.

e) The Defendant repeatedly asserts that the Plaintiff's Rule 26 disclosures in a prior lawsuit raise a question of material fact about "Whether Gordon and/or Third Party Defendants misrepresented their identities to Impulse,

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and/or its marketing partners."

This allegation is also directly relevant and forms the second half of the core of the Defendant's counterclaims and Third Party claims. However, the Plaintiff's Rule 26 disclosures do not remotely indicate that either Gordon and/or Third Party Defendants "misrepresented" their identities to Impulse, and/or its marketing partners, nor has the Defendant entered any other evidence into the record that supports that allegation. All the Plaintiff's Rule 26 disclosures indicate is that people "may" have received emails. Again, if the Defendant's allegations were true, *evidence supporting this allegation would already be in the Defendant's possession*. How can the Defendant possibly maintain that Gordon and/or Third Party Defendants "misrepresented their identities to Impulse, and/or its marketing partners" if it cannot produce any evidence of such misrepresentation? The fact that the Defendant has not produced any such evidence demonstrates that it does not exist, and the Defendant's mere allegations to the contrary do not raise a question of material fact.

Accordingly, the Plaintiff's Rule 26 disclosures from the prior lawsuit do not raise any issues of material fact that are relevant to the Defendant's counterclaims or Third Party claims which are the subject of this motion.

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The Defendant's Pleadings

With respect to Plaintiff's facts 1-12, 14, 16-18, 24 and 25, the Defendant repeatedly asserts that its pleadings create an issue of material fact. However, FRCP 56(e) specifically provides that:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.

The United States Supreme Court has generally stated that FRCP 56(e) means what it says. "Rule 56(e) permits a proper summary judgment motion to be opposed by any of the kinds of evidentiary materials listed in Rule 56(c), except the mere pleadings themselves, and it is from this list that one would normally expect the nonmoving party to make the showing to which we have referred." *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). Accordingly, the Court should disregard the Defendant's argument that the pleadings create an issue of material fact with respect to Plaintiff's facts 1-12, 14, 16-18, 24 and 25.

The Remaining Disputed Facts

With the exception of Plaintiff's facts 10, 11, 13, and 15, all of the Defendant's contentions that an issue of material fact exists with respect to any of the remaining facts are either grounded in their pleadings, or the Plaintiff's Rule 26

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disclosures. As each of those issues have been addressed above, the Plaintiff now turns to Plaintiff's facts 10, 11, 13, and 15.

With respect to Plaintiff's fact #10, the Defendant has alleged that a material issue of fact exists. However, even if there is a dispute as to whether Mr. Gordon was asked to give his consent to receive any commercial email from the Defendant, there is no dispute that his consent was subsequently withdrawn. Gordon Declaration, ¶¶ 13 and 14. Thus, for purposes of this summary judgment motion, the question of whether Mr. Gordon was asked to give his consent to receive any commercial email from the Defendant is rendered immaterial.

With respect to Plaintiff's fact #11, the Defendant has alleged that a material issue of fact exists. However, even if there is a dispute as to whether Mr. Gordon gave his consent to receive any commercial email from the Defendant, there is no dispute of the fact that his consent was subsequently withdrawn. Gordon Declaration, ¶¶ 13 and 14. Thus, for purposes of this summary judgment motion, the question of whether Mr. Gordon originally gave his consent to receive any commercial email from the Defendant is rendered immaterial.

With respect to Plaintiff's fact #13, the Defendant has alleged that a material issue of fact exists, citing the Bodie Declaration at ¶ 35. However, ¶ 35 of the Bodie declaration is not evidence. It states:

> "Nevertheless, a question of fact arises as to if and when Gordon and/or his family member's (sic) "opted-in" again after such "opt-out" occurred.

The Plaintiff notes that in making this statement, the Bodie declaration does *not* allege that anything actually happened. It merely speculates that something

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might have happened. As such, it is a combination of a legal conclusion and sheer speculation, and it does not raise any issue of material fact.

With respect to Plaintiff's fact #15, the Defendant has alleged that a material issue of fact exists, citing the Bodie Declaration at ¶¶ 32-35. However, while the Bodie Declaration admits that Exhibit F of the Declaration of Phil Huston shows that the Plaintiff "opted out" of receiving "some" but not "all" future commercial emails from the Defendant, it is immaterial whether Gordon opted out of "some" or "all" future commercial emails from the Defendant. Gordon's failure to opt out of "some" or "all" future commercial emails from the Defendant does not give the Defendant the right to send email that violates the law, nor does it give the Defendant a cause of action if it is sued for doing so.

The Defendant's Motions to Strike

In addition to its "motion" to strike the Plaintiff's Statement of Facts generally, the Defendant has also specifically asked the Court to strike Plaintiff's Facts # 19, 20, 21, and 26. With respect to Fact # 19, it is not hearsay because it falls within the exceptions of at least FRE 803(1), FRE 803(3) and FRE 803(8). With respect to Facts # 20, 21, and 26, the Defendant's purported basis for striking the statement is Rule 56.1(a). However, while Rule 56.1(a) sets forth the requirement that facts be "set forth in serial fashion and not in narrative form," it does not dictate the form or substance of such facts. Accordingly, Rule 56.1(a) does not provide a basis to strike Plaintiff's facts # 20, 21, and 26, and the Plaintiff respectfully requests that the Court deny the Defendant's motion to strike these facts.

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DATED this 21st day of October, 2005

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Certificate of Service

I hereby certify that on October 21, 2005, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System which will send notification of such filing to the following: Floyd Ivey, Peter J. Glantz, Sean Moynihan. I hereby certify that I have served the forgoing to the following non-CM/ECF participants by other means: Bonnie Gordon, Jonathan Gordon, James S. Gordon, III, Robert Prichett, Emily Abbey and Jamila Gordon.

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